# DEPARTMENT OF STATE REVENUE
# LETTER OF FINDINGS NUMBER 05-0501P
# TAX ADMINISTRATION (USE TAX)—NEGLIGENCE PENALTY FOR THE REPORTING PERIOD COVERING DECEMBER 2004

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## ISSUE

### I. Tax Administration—Negligence Penalty—Effect of Partial Payment on Liability

### Tax Administration— Effect of Oral Statement of Department Employee on Liability

Authority: IC §§ 6-8.1-5-1(b), -8-1.5 and -10-2.1(d) and (e) (2004); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002); *Sholes v. Sholes*, 760 N.E.2d 156, 159 (Ind. 2001); *State Bd. of Tax Comm'rs v. Two Market Square Assocs., L.P.*, 679 N.E.2d 882, 885 (Ind. 1997); *Ind. Dep't of State Rev. v. Horizon Bancorp*, 644 N.E.2d 870, 872 (Ind. 1994); *Middleton Motors, Inc. v. Ind. Dep't of State Rev.*, 380 N.E.2d 79, 81 (Ind. 1978); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 and 1024-25 (Ind. Tax Ct. 1999); 45 IAC §§ 15-3-2(e), -5-3(b)(8) and -8-1 (2004)

The taxpayer protests the Audit Division's proposed assessment of a negligence penalty.

## STATEMENT OF FACTS

The Department's Audit Division conducted a field audit of the taxpayer for the tax type and reporting periods set out in the heading of this Letter of Findings. As a result of the audit, the taxpayer incurred a tax deficiency. The field auditor recommended that the Audit Division waive assessing any negligence penalty, but it nevertheless assessed such a penalty. The taxpayer paid the Department the combined amount of the base tax and the accrued interest. The Department will provide additional information as needed.

## DISCUSSION

### A. TAXPAYER'S PROTEST

The representative's cover letter for the final payment alleges the field auditor advised the taxpayer not to pay the negligence penalty, and asks that the Department consider the assessment to be fully paid. The Department interprets these statements as a request by the taxpayer that the Department waive the negligence penalty imposed pursuant to IC § 6-8.1-10-2.1(a)(3) and (b)(4) (2004), and will analyze the request on that basis.

## B. ANALYSIS

The taxpayer's request is based on three assumptions. The first is that the taxpayer can specify the component/s of a proposed assessment to which it wants partial payment/s to be applied. The second is that the Department has the discretion to change the order of application of such payment/s. The third and last is that the oral advice of a Department employee can bind the Department. The following Analysis will show that all three assumptions are wrong.

IC § 6-8.1-8-1.5 (2004), which sets out how the Department is to allocate partial payments on listed taxes, reads as follows:

> Sec. 1.5. Whenever a taxpayer makes a partial payment on the taxpayer's tax liability, the department [of state revenue] *shall* apply the partial payment in the following order:
>
> *(1) To any penalty owed by the taxpayer.*
>
> (2) To any interest owed by the taxpayer.
>
> (3) To the tax liability of the taxpayer.

*Id.* (Emphasis added.) The implementing regulation, 45 IAC § 15-8-1 (2004), is to the same effect. *See id.* (so stating, adding that the payment "*shall only* be [so] applied" to "the particular billing for a given year and tax[ ]")(emphasis and alterations added).

In *Indiana Department of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870 (Ind. 1994), the Indiana Supreme Court set out certain general rules of statutory interpretation that bind the Department in applying the above statute and regulation to the present issue:

> Nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the statute itself. …. An unambiguous statute must be held to mean what it plainly expresses, and its plain and obvious meaning may not be enlarged or restricted. …. Because a statute which is clear and unambiguous on its face needs no further interpretation beyond the plain and ordinary meaning of the words contained therein, the statute must be applied and enforced as written.

*Id.* at 872 (citations omitted). "The rules of statutory construction [also] apply to the construction of administrative regulations." *State Bd. of Tax Comm'rs v. Two Market Square Assocs., L.P.*, 679 N.E.2d 882, 885 (Ind. 1997) (alteration added).

Applying the above rules to IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1, it is clear that the statute and the regulation do not confer any right on, or imply any right of, a taxpayer to tell the Department how to apply partial payment/s to an outstanding assessment. Nor does the statute give the Department discretion to apply partial payment/s to the part/s of an assessment that a taxpayer may request. Instead, IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1 both state that the Department "shall[,]" and 45 IAC § 15-8-1 states that the Department "shall only[,]" *id.*, apply the partial payment to the various components of the liability in the order specified. *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001) states the usual effect of "shall" in a statute as follows:

> Indiana case law presumptively treats "shall" as mandatory … unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. … We see no basis in the [former version of the civil pauper counsel] statute [in issue in *Sholes*, IC § 34-10-1-2 (1998),] to suggest any unusual or stylized meaning of a commonly understood word. Moreover, when a statute is unambiguous, a court must apply the plain and obvious meaning and not resort to other rules of construction.

*Id.* at 159 (citations and internal quotation marks omitted)(alteration added), *partially superseded on other grounds by statute*, Pub. L. 125-2002, § 1, 2002 Ind. Acts 1887, 1887-88, codified at IC § 34-10-1-2 (Supp. 2002). The supreme court went on to hold in that opinion, among other things, that "[a]s a matter of construction, we agree that the [former civil pauper counsel] statute by its terms confer[red] no discretion on the trial court to deny counsel if its terms [we]re met." *Id.*

Likewise, the Department has no discretion to ignore the order of assessment components set out in IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1 to which a partial payment is to be applied. There is nothing in IC § 6-8.1-8-1.5 to suggest that the General Assembly intended "shall," as used in this statute, and the Department did not intend "shall" in 45 IAC § 15-8-1, to have an out-of-the-ordinary meaning. Such being the case, the Department must treat "shall" in IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1 in its usual, mandatory sense. In addition, the word "only" in 45 IAC § 15-8-1 means that the specified order of application of partial payment/s is the sole, exclusive order the Department will use. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1577 (4th ed. 1976) (definition 1b, "only" "EXCLUSIVELY, SOLELY … .").

It follows that the Department must apply any partial payment/s received so as to satisfy the three components of an assessment in the literal order in which the statute and regulation list them. It follows that in situations like the present one, where a taxpayer makes partial payment/s equal to the base tax and accrued interest, the effect is to satisfy any negligence penalty or penalties imposed, then the accrued interest and a part of the base tax. The result of such payment/s is to leave a reduced base tax deficiency outstanding on which interest will begin accruing anew if it is left unsatisfied.

Turning to the taxpayer's third assumption, the Department will likewise assume for purposes of discussion, without necessarily finding, that the field auditor gave the advice alleged. That being said, it should be clear from the foregoing discussion that the alleged advice would have had no effect, since the taxpayer would already have satisfied the negligence penalty by the time the auditor allegedly gave that advice. Even if the penalty were still unsatisfied, however, the law is clear that the field auditor's alleged advice would not have bound the Department. Its own regulation is sufficient to give the taxpayer constructive notice that such would have been the case: "Oral opinions or advice will not be binding upon the department." 45 IAC § 15-3-2(e) (2004). In addition, the Indiana Supreme Court has ruled to the same effect. In *Middleton Motors, Inc. v. Ind. Dep't of State Rev.*, 380 N.E.2d 79 (Ind. 1978), *vacating* 366 N.E.2d 226 (Ind. Ct. App. 1977), the named taxpayer had relied on wrong advice of a former deputy director of revenue that the period for bringing suit on a denied claim for refund was substantially longer than that actually set out in the refund nonsuit statute. 366 N.E.2d at 227. The supreme court affirmed the trial court's dismissal of the untimely refund suit, stating: "All persons are charged with the knowledge of the rights and remedies prescribed by [Indiana's tax] statute[s]." 380 N.E.2d at 81 (alterations added). Such knowledge necessarily includes whether rights or remedies under those

statutes actually exist, if so what conditions are imposed on their availability, what acts will and will not invoke them, and any restrictions on exercising them.

*Middleton Motors* thus imputes to persons subject to the listed taxes constructive knowledge of IC §§ 6-8.1-8-1.5 and -10-2.1(d) and (e). In particular, regarding the present situation, such knowledge of IC § 6-8.1-8-1.5 includes knowledge that a taxpayer has no right under that statute to specify how the Department is to apply partial payment/s on an assessment of a listed tax. Constructive knowledge of IC § 6-8.1-10-2.1(d) and (e) includes knowledge that the Department may (but is not necessarily required to) waive a negligence penalty only when the person requesting such a waiver complies with the procedures set out in those subsections for doing so. The present taxpayer did not comply with those subsections, and the Department therefore cannot consider, and the taxpayer is not entitled to, relief from the negligence penalty assessed.

As previously noted, the effect of the taxpayer's partial payment was to leave a reduced base tax deficiency outstanding. The taxpayer has made no argument as to why the base tax assessment is wrong, as IC § 6-8.1-5-1(b) requires. Indiana law is settled that this state's taxation hearing officers, and by extension the state-level taxing authorities of which they are agents, "do not have the duty to make a taxpayer's case." *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999), *cited with approval in State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002). The Tax Court stated the rationale for this rule in *Hoogenboom-Nofziger* as follows:

> [T]o allow [a taxpayer] to prevail after it made such a cursory showing at the administrative level would result in a tremendous workload increase for [the Department and] the State Board [now the Indiana Board of Tax Review], … administrative agenc[ies] that already bear[ ] … difficult burden[s] in administering this State's [listed and] property tax system[s]. If taxpayers could make a de minimis showing and then force [the Department or] the State Board to support its decisions with detailed factual findings, the [Indiana taxing authorities] would be overwhelmed with cases such as this one. This would be patently unfair to other taxpayers who do make detailed presentations to the [taxing authorities] because resolution of their appeals would necessarily be delayed.

715 N.E.2d at 1024-25 (alterations added).

## FINDING

The taxpayer's protest is denied.

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